IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

APPEAL NO. 136 OF 1999
IN
ARBITRATION PETITION NO.318 OF 1998

Deutsche Bank A.G.
a Banking Company incorporated
under the laws prevailing in the
Federal Republic of Germany,
having its Principal Office at
Taunusanglage 12 60325 Frankfurt,
Germany and its Mumbai Branch
Office at DBS House, Hazarimal
Somani Marg, Fort, Mumbai 400 001. Appellants
(original Petitioners)

vs.

R. C. Goenka
of Bombay, Indian Inhabitant
having his office at Saroosh
Building, 251, Dr.D.N. Road,
Mumbai 400 001. Respondent
(original Respondent)

ALONG WITH
APPEAL NO.153 OF 1999
IN
ARBITRATION PETITION NO.318 OF 1998

R. C. Goenka
of Bombay, Indian Inhabitant
having his office at Saroosh
Building, 251, Dr.D.N. Road,
Mumbai 400 001. Appellant
(original Respondent)

vs.

Deutsche Bank A.G.
a Banking Company incorporated
under the laws prevailing in the
Federal Republic of Germany,
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Office at DBS House, Hazarimal
Somani Marg, Fort, Mumbai 400 001. Respondents
(original Petitioners)

CORAM : R. M. LODHA &
J. P. DEVADHAR,JJ.

DATED : 30th August 2004

ORAL JUDGMENT (Per R.M. Lodha,J.)

These two appeals arise out of arbitration petition no.318/1998. The said arbitration petition was filed by the Deutsche Bank A.G. ("the Bank") aggrieved by the order dated 14th September 1998 passed by the arbitral tribunal comprising of two arbitrators overruling the objections of the Bank that reference to arbitration was time barred and that the claim was barred by limitation.

2. By means of the arbitration petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996'), the Bank challenged the order on the ground that the composition of the Arbitral Tribunal was contrary to Section 10 of the Act of 1996 and that the provisions of the Indian Limitation Act were attracted and reference as well as the claim were beyond time. The claimant opposed the arbitration petition inter alia on the ground that it was not maintainable because the order of the arbitrator on the issue of limitation was not an arbitral award within the meaning of Section 2(c) of the Act of 1996.

3. The learned Single Judge heard the arbitration petition no.318/1998 along with two other arbitration petitions. The learned Single Judge held that Section 10 of the Act of 1996 was non-derogable provision. He invoked section 14(2) of the Act of 1996 and examined whether the composition of arbitrators was legal and held that the arbitral tribunal comprising of two arbitrators was not permissible under section 10 and the arbitrators could not proceed with the arbitration dejure. However, the learned Single Judge upheld the finding given by the arbitrators on the issue of limitation. The claimant has preferred the appeal being appeal no.152/1998 aggrieved by the order of the learned Single Judge to the extent it has been held that the provision contained in Section 10 is non-derogable; the arbitrators could not dejure proceed with the arbitration and overruling the objection regarding maintainability of arbitration petition under section 34. Appeal no.136/1999 has been preferred by the Bank aggrieved by the finding of the learned Single Judge upholding the arbitral Tribunal's finding on the issue of limitation.

4. We heard both the learned counsel for the parties at quite some length.

5. The view of the learned Single Judge that Section 10

is non-derogable provision is unsustainable and has to be set aside. Firstly because the learned Single Judge while holding that Section 10 of the Act of 1996 is non-derogable provision relied upon his earlier decision in the case of Vinay Bubna vs. Yogesh Mehta & ors. (Arbitration Petition No.130/1998) but the said decision has been reversed by the Division Bench.

6. The learned Single Judge in the impugned order held thus:

> "The second contention however, is that the Arbitral Tribunal is not properly constituted and therefore Arbitral Tribunal as presently composed cannot proceed to dispose off the claim. In Arbitration Petition No.130 of 1998 Vinay Bubna vs. Yogesh Mehta & ors. L.J. (s) 1998 613 decided on 7/9/1998, I have taken view that where the Arbitral Tribunal consists on an even number of Arbitrators, the same would be contrary to the section 10 of the Act of 1996. In the instant case, the composition of the Tribunal is of two members and consequently it will be contrary to section 10 of the Act, as parties cannot derogate from the said provision."

7. The judgment of the learned Single Judge in the matter of Vinay Bubna was carried in appeal at the instance of Stock Exchange, Mumbai. The Division Bench by its judgment dated 4/5-02-1999, The Stock Exchange, Mumbai vs. Vinay Bubna & ors, reported in 1999 (2) Bom. C.R. 597 set aside that judgment and held that Section 10 of the Act of 1996 is derogable provision. While holding so the Division Bench held that the rules and

byelaws framed by the Stock Exchange are framed under the authority conferred under Securities Contracts (Regulation) Act, 1956 and have statutory force. These rules and byelaws which are statutory in nature prevail and Section 10 is no impediment in following the bye-law 249(a). The Division Bench held that byelaw 249(a) is covered by the phrase "under any other enactment" occurring in Section 2(4) of Act of 1996 and the same in so far inconsistent with provisions of the Act of 1996 shall prevail.

8. In the case of Narayan Prasad Lohia v. Nikunj Kumar Lohia & ors., (2002)3 S.C.C. 572, the Supreme court considered the question whether section 10 was a non-derogable provision and held thus:

> "14. We have heard the parties at length. We have considered the submissions. Undoubtedly, Section 10 provides that the number of arbitrators shall not be an even number. The question still remains whether Section 10 is a non-derogable provision. In our view the answer to this question would depend on the question as to whether, under the said Act, a party has a right to object to the composition of the Arbitral Tribunal, if such composition is not in accordance with the said Act, and if so, at what stage. It must be remembered that arbitration is a creature of an agreement. There can be no arbitration unless there is an arbitration agreement in writing between the parties.
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> 15. In the said Act, provisions have been made in Sections 12, 13 and 16 for challenging the competence, impartiality

and jurisdiction. Such challenge must however be before the Arbitral Tribunal itself.

16. It has been held by a Constitution Bench of this Court, in the case of Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. that Section 16 enables the Arbitral Tribunal to rule on its own jurisdiction. It has been held that under Section 16 the Arbitral Tribunal can rule on any objection with respect to existence or validity of the arbitration agreement. It is held that the Arbitral Tribunal's authority under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus it is no longer open to contend that, under Section 16, a party cannot challenge the composition of the Arbitral Tribunal before the Arbitral Tribunal itself. Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if it so chooses, not to raise such a challenge. Thus a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a non-derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

17. We are also unable to accept Mr.Venugopal's argument that, as a matter of public policy, Section 10 should be

held to be non-derogable. Even though the said Act is now an integrated law on the subject of arbitration, it cannot and does not provide for all contingencies. An arbitration being a creature of agreement between the parties, it would be impossible for the legislature to cover all aspects. Just by way of example Section 10 permits the parties to determine the number of arbitrators, provided that such number is not an even number. Section 11(2) permits parties to agree on a procedure for appointing the arbitrator or arbitrators. Section 11 then provides how arbitrators are to be appointed if the parties do not agree on a procedure or if there is failure of the agreed procedure. A reading of Section 11 would show that it only provides for appointments in cases where there is only one arbitrator or three arbitrators. By agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for a procedure for their appointment or there is failure of the agreed procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean that the agreement of the parties is invalid? The answer obviously has to be in the negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators. Similarly, even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator,

presuming there was one, had differed. Thus we do not see how there would be waste of time, money and expense if a party, with open eyes, agrees to go to arbitration of two persons and then participates in the proceedings. On the contrary there would be waste of time, money and energy if such a party is allowed to resile because the award is not to its liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.

18. Even otherwise, under the said Act the grounds of challenge to an arbitral award are very limited. Now an award can be set aside only on a ground of challenge under Sections 12, 13 and 16 provided such a challenge is first raised before the Arbitral Tribunal and has been rejected by the Arbitral Tribunal. The only other provision is Section 34 of the said Act. The only ground, which could be pressed in service by Mr. Venugopal, is that provided under Section 34(2)(a)(v). Section 34(2)(a)(v) has been extracted hereinabove. According to Mr.Venugopal if the composition of the Arbitral Tribunal or the arbitral procedure, even though it may be in accordance with the agreement of the parties, is in conflict with a provision of the Act from which the parties cannot derogate, then the party is entitled to have the award set aside. He submits that the words "unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate" as well as the words "failing such agreement" show that an award can be set aside if the agreement is in conflict with a provision of Part I of the said Act or if there is no agreement which is in consonance with the provisions of Part I of the said Act. In other words, according to Mr.Venugopal, even if the composition or procedure is in accordance with the agreement of the parties an award can be set aside if the composition or procedure is in conflict with the provisions of Part I of the said Act. According to Mr.Venugopal the words

"failing such agreement" do not mean that there should be no agreement in respect of the composition of the Tribunal or the arbitral procedure. According to Mr. Venugopal, an agreement in respect of the composition of the Arbitral Tribunal or arbitral procedure which is not in consonance with a provision of Part I of the said Act would be invalid in law and therefore would be covered by the phrase "failing such agreement". He submits that the words "failing such agreement" mean failing an agreement which is in consonance with a provision of Part I of the said Act. He submits that Section 34(2)(a)(v) entitles the respondents to challenge the award and have it set aside.

19. In our view, Section 34(2)(a)(v) cannot be read in the manner as suggested. Section 34(2)(a)(v) only applies if "the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the Arbitral Tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement was in conflict with a provision of this Part" wold only arise if the composition of the Arbitral Tribunal or the arbitral procedure is not in accordance with the agreement of the parties. When the composition or the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a case the right to challenge the award is restricted. The challenge can only be provided the agreement of the parties is in conflict with a provision of Part I from which the parties cannot derogate. In other words, even if the composition of the Arbitral Tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the

> party cannot challenge the award. The words "failing such agreement" have reference to an agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure. If there is no agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure and the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with Part I of the said Act then also a challenge to the award would be available. Thus so long as the composition of the Arbitral Tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the Arbitral Tribunal was in conflict with the provisions of Part I of the said Act. This also indicates that Section 10 is a derogable provision."

9. No doubt is left after the authoritative pronouncement of the Supreme Court cited supra that Section 10 is derogable provision. The view of the learned Single Judge that the parties cannot derogate from Section 10 and the composition of Arbitral Tribunal of two members is impermissible and the two arbitrators dejure cannot proceed with the arbitration, thus, is not legally correct view and cannot be sustained.

10. Though on behalf of the claimant it was contended that the petition under Section 34 was not maintainable since the finding on question of limitation did not amount to arbitral award under Section 2(c) of the Act

of 1996, the learned Single Judge cursorily rejected the said contention and held that he had jurisdiction under Section 14(2) of the Act of 1996. We are afraid, this approach of the learned Single Judge was not proper. He ought to have considered the aspect whether the finding of the arbitral tribunal that reference as well as claim was within limitation amounted to an 'arbitral award' within the meaning of section 2(c) of the Act of 1996 because if it was so only then petition under section 34 would be maintainable and the legality and correctness of the impugned finding of limitation could have been examined. Section 14(2) has no application. The matter, therefore, has to be remanded back to the learned Single Judge.

11. We, accordingly, set aside the order dated 17th November 1998 passed by the learned Single Judge in so far as arbitration petition no.318/1998 is concerned and restore the said arbitration petition. The learned Single Judge shall hear the parties on the question whether the arbitration petition under Section 34 was maintainable and if the petition is held maintainable, examine correctness of the finding of the Arbitral Tribunal on the issue of limitation afresh. Both the appeals are disposed of accordingly. Since the arbitration petition pertains to the year 1998, we

request the learned Judge to hear and dispose of the arbitration petition no.318/1998 expeditiously.

12. No costs.

The parties may be provided ordinary copy of this order duly authenticated by the Court Associate on payment of usual copying charges.

(R.M. LODHA, J.)

(J.P. DEVADHAR,J.)